

ATTACHMENT 12

HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SURGICAL INSTRUMENT SERVICE
COMPANY, INC.,

Plaintiff,

v.

INTUITIVE SURGICAL, INC.,

Defendant.

Case No.: 3:21-cv-03496-VC

Expert Report of Richard F. Bero, CPA, CVA
December 2, 2022

HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY

TABLE OF CONTENTS

I.	Introduction.....	1
A.	Assignment	1
B.	Alleged Wrongdoings	1
C.	Basis for opinions	2
D.	Expert experience and compensation.....	3
E.	Trial.....	4
F.	Basic damages assumptions	4
G.	Opinions Summary	6
II.	Parties in suit.....	7
A.	Plaintiff – SIS.....	7
B.	Defendant – Intuitive	8
III.	Additional Parties not in suit – Rebotix and Restore.....	10
A.	Rebotix	10
B.	Restore	12
IV.	Intuitive’s da Vinci surgical system.....	13
A.	Launched in 1999.....	13
B.	da Vinci Products – 5 categories.....	14
C.	da Vinci Surgical System Models.....	14
D.	Placed primarily in acute care hospitals.....	15
E.	da Vinci Surgical System Components.....	16
	1. Surgeon’s Console	16
	2. Patient-Side Cart	16
	3. 3DHD Vision System	17
	4. Firefly Fluorescence Imaging (“Firefly”)	17
	5. Da Vinci Xi Integrated Table Motion.....	17

HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY

F.	U.S. systems sales – 600 and 865 systems placed in 2020 and 2021	18
G.	Installed U.S. daVinci systems – 3,720 units and 4,139 units as of December 31, 2020 and December 31, 2021	18
H.	Number of daVinci procedures	18
I.	da Vinci Surgical Systems Sales and Profits	19
V.	Intuitive’s EndoWrist Instruments and Accessories	19
A.	10 to 18 uses per EndoWrist	20
B.	S/Si and X/Xi EndoWrists are essentially the same (except for encryption)	21
C.	U.S. S/Si and X/Xi EndoWrist annual unit sales – 2014 through annualized 2022	21
D.	EndoWrist sales and profits	21
E.	Expired and potentially repairable EndoWrists approximate 60% of current year units sold.....	22
VI.	SIS’s EndoWrist repair service	23
A.	Monumental Interest in SIS’s repair program	24
B.	SIS’s sales prices ranging from \$1,100 to \$1,700 per repair, representing an average discount of 42%	25
C.	SIS’s estimated repair services applied to all U.S. da Vinci systems’ installed base equates to more than \$800 million potential EndoWrist repair service revenue per year	25
D.	Subcontracted 2019 repair work to Rebotix	26
E.	Initial EndoWrist Repair Sales and Customers.....	27
F.	Intended to repair EndoWrists in-house	27
G.	EndoWrist Recovery (as opposed to repair) Program	27
VII.	Intuitive considered its own instrument refurbishment service but decided against it....	28
VIII.	Rebotix’s repair program – working with SIS	29
A.	Would have first begun repairing X/Xi by as early as 2019.....	30
IX.	Restore’s repair program – working with SIS	31

HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY

A.	Expected greater than 70% to 80% of market would use repair services	31
B.	Expected 72% of EndoWrists received would be repairable.....	31
C.	Would have first begun repairing X/Xi no later than January 2022 and potentially as early as January 2021	31
X.	GPO’s.....	33
A.	Vizient – more than 60% of U.S. acute care providers in 2022.....	33
1.	September 2016 Vizient – SIS Agreement	33
2.	September 2019 Vizient – SIS Agreement Amendment specific to EndoWrist repairs	34
3.	August 2020 Vizient – SIS Agreement - specific to EndoWrist recovery (not repairs).....	35
4.	Subsequent Vizient – SIS Agreement Amendments – specific to EndoWrist recovery (not repairs).....	36
B.	Premier – 2 nd largest GPO in the U.S.	36
C.	HealthTrust	37
XI.	Robotic Surgery Industry	37
XII.	Surgical Instruments Industry	38
XIII.	Anticompetitive Conduct Damages	40
XIV.	SIS’s Lost Profits Damages	41
A.	The ‘but for’ analysis - difference between ‘would-have-been’ and ‘actual’	41
B.	The Alleged Wrongdoings caused SIS’s lost revenue and profits.....	42
C.	Demand – monumental interest	42
D.	Capacity and capability to perform EndoWrist repairs.....	45
E.	Scenario 1 – Illegal Encryption lost profits damages	46
1.	Lost EndoWrist repair units	46
a)	‘Would-Have-Been’ EndoWrist repair units – through 2025.....	47

HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY

(i)	EndoWrist instruments potentially repairable by SIS – unit sales.....	47
(ii)	Expiration rate of new sales units – 60%	48
(iii)	Market share rate based on Vizient – 55%	49
(iv)	Conversion rate – 15%, 50%, 70%	50
(v)	Collection rate – 70%.....	51
(vi)	Repair yield rate – 72%.....	51
(vii)	‘Would-Have-Been’ EndoWrist repair units through 2025.....	52
(viii)	‘Would-Have-Been’ EndoWrist repair units – 2% to 12% of units sold	52
b)	Actual EndoWrist repair units	53
c)	Lost EndoWrist repair units	53
2.	Lost revenue.....	53
3.	Less: Incremental costs	54
a)	In-house repair model costs	54
(i)	Repair costs	54
(ii)	Chip costs.....	55
(iii)	Vizient GPO administrative fee	55
(iv)	SGA costs.....	56
b)	Distributor model costs	56
4.	SIS’s In-house model lost profits through 2025 – approximately \$102.6 million	57
5.	SIS’s Distributor model lost profits through 2025 – approximately \$40.9 million	57
6.	Annual lost profits per unit	57
F.	Scenario 2 – Unenforceable Contracts lost profits damages	57

HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY

XV.	Lanham Act Damages.....	58
XVI.	Conclusion	59

HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY

- I assume the parties’ reported revenue, costs and other data are generally accurate and reliable;¹¹
- SIS would have had the capability / capacity to make the lost sales;¹²
- Rebotix or Restore would have had the capability and capacity to produce enough chips to be used in SIS’s EndoWrist repairs;¹³
- SIS would not need FDA approval to make its repairs;¹⁴

In Scenario 1, I assume:

- SIS would have been able to repair both S/Si and X/Xi EndoWrist instruments as of January 1, 2020 (I refer to this as the “In-house model”);¹⁵
- Alternatively, Rebotix or Restore would have been able to repair both S/Si and X/Xi EndoWrist instruments as of January 1, 2020 (I refer to this as the “Distributor model”);¹⁶

In Scenario 2, I assume:

- SIS would have been able to repair S/Si EndoWrist instruments as of January 1, 2020 (the In-house model),¹⁷
- Alternatively, Rebotix or Restore would have been able to repair the S/Si EndoWrist instruments as of January 1, 2020 (the Distributor model);¹⁸
- SIS (relying on either Rebotix, Restore or another third-party technology provider) would have been able to reset the X/Xi EndoWrist instruments use counter either by January 1, 2021 or January 1, 2022, and SIS, Rebotix or Restore would have been able to repair X/Xi EndoWrist instruments as of either January 1, 2021 or January 1 2022;¹⁹

¹¹ If the parties’ reported information is incorrect, I reserve the right to update my analyses accordingly.

¹² As addressed herein.

¹³ Based on SIS’s relationships with Rebotix / Restore prior to the Alleged Wrongdoings as addressed herein. Rebotix and Restore are defined below.

¹⁴ Discussions with Keith Johnson and Greg Posdal. *See also*, Deposition of Imron Zafar (November 1, 2022) Ex. 113 at 3.

¹⁵ As addressed herein.

¹⁶ Based on SIS’s relationships with Rebotix / Restore prior to the Alleged Wrongdoings as addressed herein.

¹⁷ As addressed herein.

¹⁸ Based on SIS’s relationships with Rebotix / Restore prior to the Alleged Wrongdoings as addressed herein.

¹⁹ Based on SIS’s relationships with Rebotix / Restore prior to the Alleged Wrongdoings as addressed herein and discussion with Kurt Humphrey, SIS’s technical expert.

HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY

Table 2: Intuitive Surgical, Inc. - Historical Financial Summary (in millions)

	2016	2017	2018	2019	2020	2021
Revenue	\$2,706.5	\$3,138.2	\$3,724.2	\$4,478.5	\$4,358.4	\$5,710.1
Gross Profit	\$1,892.9	\$2,202.0	\$2,604.1	\$3,110.2	\$2,861.2	\$3,958.5
<i>Gross Margin %</i>	70%	70%	70%	69%	66%	69%
Income from Operations	\$949.7	\$1,062.9	\$1,199.4	\$1,374.5	\$1,049.8	\$1,821.0
<i>Income from Operations %</i>	35%	34%	32%	31%	24%	32%

III. Additional Parties not in suit – Rebotix and Restore

A. Rebotix

Rebotix Repair LLC (“Rebotix”) is a Florida limited liability company with its principal address in St. Petersburg, Florida.⁵³ Rebotix provides service and replacement components that help hospitals get back in control of their robotic surgical instruments, such as repairing EndoWrist instruments used in da Vinci robotic surgeries.⁵⁴

Rebotix also sued Intuitive for issues related to servicing its EndoWrists, in which Rebotix claimed: (1) Tying; (2) Exclusive Dealing; (3) Monopolization; and (4) Attempted Monopolization.⁵⁵ I understand that case has settled.

In the spring / summer of 2019, SIS began working with Rebotix on its EndoWrist repair business.⁵⁶ SIS initially provided the repair business customers while Rebotix provided the “Interceptor chip” (or ”repair chip”) to reset S / Si EndoWrist counters enabling additional EndoWrist uses as well as the actual repair.⁵⁷

[REDACTED]
[REDACTED]⁵⁸ The Interceptor was developed for Rebotix by a

⁵³ Compl. ¶ 5 (*Rebotix Repair LLC v. Intuitive Surgical, Inc.*, No. 8:20-cv-02274-VMC-TGW (M.D. Fla. filed Sept. 28, 2020)).

⁵⁴ <https://rebotixrepair.com>. Compl. ¶ 5 (*Rebotix Repair LLC v. Intuitive Surgical, Inc.*, No. 8:20-cv-02274-VMC-TGW (M.D. Fla. filed Sept. 28, 2020)).

⁵⁵ Compl. ¶¶ 62-73 (*Rebotix Repair LLC v. Intuitive Surgical, Inc.*, No. 8:20-cv-02274-VMC-TGW (M.D. Fla. filed Sept. 28, 2020)).

⁵⁶ 30(b)(1) Deposition of Greg Posdal 23-25 (November 1, 2022).

⁵⁷ 30(b)(1) Deposition of Greg Posdal 25 (November 1, 2022).

⁵⁸ Deposition of Chris Gibson 35-38 (June 22, 2021) (*Rebotix Repair LLC v. Intuitive Surgical, Inc.*, No. 8:20-cv-02274-VMC-TGW (M.D. Fla. filed Sept. 28, 2020)).

HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY

Rebotix started working with Restore (as addressed below) in 2018.⁷¹ Originally, Restore was going to be a distributor for Rebotix, meaning they would get the EndoWrists from hospitals, send them to Rebotix for repair and reset, and then deliver them back to hospitals.⁷² Restore then started buying Interceptors from Rebotix, so that Restore could do the repair and reset.⁷³ Rebotix sold the Interceptor to Restore for an average price of approximately \$533 per chip.⁷⁴ It appears Restore received a larger discount with higher chip purchases.⁷⁵ Ultimately, Rebotix stopped working with Restore because Restore wasn’t doing the volume Rebotix expected them to have.⁷⁶

B. Restore

Restore Robotics LLC and Restore Robotics Repair LLC (collectively, “Restore”) are Florida limited liability companies with their principal address in Panama City Beach, Florida.⁷⁷ They are sister companies with common ownership having majority control of both companies.⁷⁸ Restore services surgical robots and related instruments, Restore Robotics is the sales arm and Restore Robotics Repairs is the operations arm.⁷⁹

Restore also sued Intuitive for issues related to servicing its EndoWrists, in which Rebotix claimed: (1) Monopolization; (2) Attempted Monopolization; (3) Tying; and (4) Exclusive Dealing.⁸⁰ I understand the case is ongoing.

SIS and Restore are partners in SIS’s EndoWrist recovery business.⁸¹ SIS’s EndoWrist recovery business identifies an EndoWrists’ available lives remaining and confirms EndoWrist

⁷¹ Deposition of Clifton Parker 142 (October 25, 2022).

⁷² Deposition of Chris Gibson 143-144 (June 22, 2021) (*Rebotix Repair LLC v. Intuitive Surgical, Inc.*, No. 8:20-cv-02274-VMC-TGW (M.D. Fla. filed Sept. 28, 2020)).

⁷³ Deposition of Chris Gibson 144 (June 22, 2021) (*Rebotix Repair LLC v. Intuitive Surgical, Inc.*, No. 8:20-cv-02274-VMC-TGW (M.D. Fla. filed Sept. 28, 2020)).

⁷⁴ Schedule 10.0.

⁷⁵ Schedule 10.0.

⁷⁶ Deposition of Chris Gibson 145-146 (June 22, 2021) (*Rebotix Repair LLC v. Intuitive Surgical, Inc.*, No. 8:20-cv-02274-VMC-TGW (M.D. Fla. filed Sept. 28, 2020)).

⁷⁷ Second Am. Compl. ¶ 1 (*Restore Robotics LLC, et al. v. Intuitive Surgical, Inc.*, No. 5:19-cv-00055-TKW-MJF (N.D. Fla. filed Feb. 27, 2019)).

⁷⁸ Second Am. Compl. ¶ 1 (*Restore Robotics LLC, et al. v. Intuitive Surgical, Inc.*, No. 5:19-cv-00055-TKW-MJF (N.D. Fla. filed Feb. 27, 2019)).

⁷⁹ Second Am. Compl. ¶ 1 (*Restore Robotics LLC, et al. v. Intuitive Surgical, Inc.*, No. 5:19-cv-00055-TKW-MJF (N.D. Fla. filed Feb. 27, 2019)).

⁸⁰ Second Am. Compl. ¶¶ 106-129 (*Restore Robotics LLC, et al. v. Intuitive Surgical, Inc.*, No. 5:19-cv-00055-TKW-MJF (N.D. Fla. filed Feb. 27, 2019)).

⁸¹ 30(b)(6) Deposition of Greg Posdal 51 (November 1, 2022).